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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-813

ARMANDO CAPONIGRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF HUGH J. ADDONIZIO AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Interest of Hugh J. Addonizio

On September 24, 1970, judgment of conviction was entered against Hugh J. Addonizio pursuant to a jury verdict. The crimes with which Mr. Addonizio was charged were extortion and conspiracy to commit extortion under the Hobbs Act, 18 U.S.C., Section 1951. The United States Court of Appeals for the Third Circuit affirmed the conviction and this Court denied Mr. Addonizio's Petition for Certiorari on February 22, 1972.

Addonizio in his Petition for Certiorari, as Petitioner Caponigro in the instant case, requested that this Court decide whether under the Hobbs Act the crimes of extortion and bribery are mutually exclusive and whether the trial court must so charge the jury, specifically differentiating between the two crimes, where the evidence introduced at trial raises a factual question as to which crime was committed.[1]

Reasons for Granting the Writ

This case presents the Court with the opportunity to clarify the scope of a federal criminal statute under which many indictments are prosecuted each year, but which has neither adequately nor uniformly been interpreted by the lower Federal courts.

The definitions of "extortion" and "robbery" as they appear in the Hobbs Act were copied substantially from the New York Code. After reviewing the legislative history of the statute, the Third Circuit held that in interpreting the Hobbs Act it was required to look to the New York Penal Laws and the construction given them by the New York courts. *United States* v. *Nedley,* 255 F.2d 350, 355 (3 Cir. 1958).

Under the New York law upon which the Hobbs Act was based, former New York Penal Law §§ 850, et seq., bribery and extortion were mutually exclusive crimes. See e.g., *People* v. *Feld,* 262 App. Div. 909 (2d Dep't. 1941), 28 N.Y.S. 2d 796 (Sup. Ct. 1941); *People* v. *Dioguardi,* 8 N.Y. 2d 260, 273 (1960); *Hornstein* v. *Paramount Pictures, Inc.,* 22 Misc. 2d 996 (Sup. Ct. 1942), *aff'd,* 266 App. Div. 659 (1st Dep't.), *aff'd.* 292 N.Y. 468 (1943).

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[1] The written consents of both the Petitioner and the Respondent are being filed simultaneously with this brief.

In *Feld,* the Court stated:

> "The evidence was ample to establish the crime charged against him in the indictment. We are, nevertheless, constrained to reverse the judgment because there was error in the charge of so substantial a character that it cannot be disregarded. The defense was that the employer, instead of being a victim of extortion, had bribed the representatives of the labor union in violation of section 380 of the Penal Law. That this was the theory of the defense is indubitably established by the exception taken to the Court's charge . . . . The evidence was overwhelmingly the other way, but a question of facts was presented and the appellant was entitled to have the jury instructed that if the employer were guilty of bribery, the appellant could not be guilty of exortion. The two crimes are mutually exclusive." *supra,* 262 App. Div. at 909, 28 N.Y.S. 2nd, at 797.

Had it been the intention of Congress to broaden the scope of the crimes prescribed by the Hobbs Act beyond the New York statute it could have easily done so. See, for example, Title 18 U.S.C. Section 1952 enacted by Congress in 1961. The definition of "unlawful activity" thereunder is defined in part as: "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.", 18 U.S.C. Section 1952 (b) (2). The penalty for a violation of 18 U.S.C. Section 1952 is imprisonment for not more than five years or a fine of $10,000.00. The penalty for a violation of Title 18 U.S.C. Section 1951 is imprisonment for a period of twenty years.

In *United States* v. *Kubacki,* 237 F.Supp. 638 (E.D. Pa. 1965) the defendant was indicted under both 18 U.S.C.

Section 1951 and 18 U.S.C. Section 1952. Kubacki was the Mayor of Reading, Pennsylvania and one Roger Weidlich was a salesman for a parking meter company. In a meeting between Weidlich and Kubacki, Kubacki indicated that the city of Reading would purchase parking meters from Weidlich's company and suggested a political donation of $15.00 per meter. Other city officials recommended to Weidlich by the Mayor made it clear that the "suggestion" was actually a demand and Weidlich testified that he believed he would lose the order if he did not make the donation. An agreement was reached by which $6.00 per meter was paid.

At page 641 the Court stated:

> "In simple terms, the government charged that these people were compelled to make a payoff for the privilege of bidding, i.e., for the privilege of competing for the award of the parking meter contract. The evidence established, instead, that Weidlich and Roach were bargaining for improper influence, for favored treatment, i.e. they were bargaining for the improper award of the contract to them without the necessity to compete."

The Court looked to the New York decisions for the definition of extortion, cited *People* v. *Dioguardi, supra,* for the proposition that, "one who pays a bribe is equally as guilty as the one who receives it, 'which could never be the case with extortion'" *supra,* 641; and then applied the distinction between the crimes of bribery and extortion as set forth in that case, concluding that as a matter of law the evidence did not sustain a conviction on charges of extortion. Accordingly, the motion for acquittal on those counts brought under Title 18 U.S.C. Section 1951 was granted. The motion for acquittal on those counts brought under Title 18 U.S.C. Section 1952 was denied.

In *United States* v. *Addonizio,* 451 F.2d 49 (3rd Cir. 1972), *cert. denied,* 405 U.S. 936, the sole defense of several of the defendants was that the evidence, if proving any crime, proved bribery rather than extortion. All defendants joined in requests that the trial court charge the jury that the two crimes were mutually exclusive specifically differentiating between the elements of each crime. Apparently agreeing that the evidence at least presented a jury question, the Third Circuit wrote:

> ". . . [W]hile the contractors' advance knowledge that a kickback would be required might give rise to a jury question as to whether the transactions were briberous or extortionate, we cannot agree that advance knowledge alone conclusively establishes bribery." *supra,* 73

The only charge touching on the issue given to the jury was that the jury had to find the defendants had "wrongfully used actual fear . . . in order to induce Constrad to pay them money . . . [U]nless the payments here alleged were made under some form of compulsion, there is no crime under the Hobbs Act. The mere voluntary payment of money, unaccompanied by any [fear] of economic loss, would not constitute extortion." The Court held:

> "Even assuming *arguendo* that the appellants are correct as to the state of the evidence and as to the mutual exclusivity of the crimes we have concluded that no error was committed, for the court delivered an adequate charge on the legal questions involved." (footnote omitted) *supra,* 77

If the crime of extortion under the Hobbs Act is inconsistent with the crime of bribery, we submit that a charge such as the one given in *Addonizio,* where a factual issue

as to which crime was committed was presented, is wholly inadequate. There the trial court refused even to use the word "bribery". The limited charge which it did give was meaningless without further definition of the terms, "voluntary", "compulsion", and "fear of economic loss".

Other federal courts have reached the conclusion that under the Hobbs Act extortion is not mutually inconsistent with bribery and that bribery and extortion may or may not have both been committed in a given transaction, depending upon the facts of the case. *United States* v. *Pranno,* 385 F.2d 387 (7th Cir., 1967), *cert. denied,* 390 U.S. 944 (1967). See also *Bianchi* v. *United States,* 219 F.2d 182 (8th Cir., 1955), *cert. denied,* 349 U.S. 915; *Esperti* v. *United States,* 406 F.2d 148, (5th Cir., 1969), *cert. denied,* 394 U.S. 1000.

We respectfully submit that the federal cases dealing with extortion under the Hobbs Act have left unsettled the question of whether the New York decisions construing the New York statute upon which the Hobbs Act was based should be followed. These decisions held that the crimes of bribery and extortion are mutually exclusive. It is further respectfully submitted that guidance from this Court is required on the question of the adequacy of jury instructions differentiating between the crimes of bribery and extortion where the evidence has presented a factual question as to which crime was committed.

CONCLUSION

It is therefore respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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